Supreme Court, U.S.
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No. 01-1534

IN THE

Supreme Court of the United States

TIMOTHY PATRICK KORNWOLF,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court Of Appeals
for the Eighth Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Kornwolf has been criminally convicted at the instance of the federal government for selling property which he not only indisputably owned, but which also is innocuous and historically significant. The government does not dispute that Kornwolf had no reason to suspect when he obtained this property decades ago that its sale would one day be criminal. The purported justification for criminalizing this most basic of commercial transactions is protection of the living golden eagle, yet the feathers that are an integral part of this property are from birds which died a century ago. Neither Kornwolf nor any other owner of antique feathered Indian artifacts has ever had the benefit of a judicial determination that denying them possibly the most fundamental aspect of property ownership has contributed in any way to protection of the golden eagle. At the same time, prosecutions such as this undoubtedly promote destruction of antique Indian artifacts.

The government's response to Kornwolf's claim that this prosecution is an unconstitutional taking of his property is that the Fifth Amendment primarily protects real as opposed to personal property, a proposition that finds no support in the history or text of the Fifth Amendment. In response to Kornwolf's argument that he has been denied all economic value in his property — because sale is the only practical means of realizing value for a non-income-producing asset — the government blithely suggests he can destroy the artifact and try to sell some part of it or pitch a tent and charge admission to see it. And although the government maintains that Kornwolf has no right to compensation, it suggests its own Catch-22, that this Court cannot consider Kornwolf's constitutional arguments because he has not sought compensation from the Court of

Federal Claims, where compensation will most certainly be denied on the strength of *Andrus v. Allard*, 444 U.S. 51 (1979), a case only this Court can clarify, modify or overrule. According to the government, Kornwolf is required to seek compensation in the Court of Federal Claims even though the relief he wants is reversal of his conviction and restoration of his good name — relief clearly beyond the jurisdiction of that court.

That the "logic" of the government's position invites comparisons to Joseph Heller's *Catch-22* illustrates the existing uncertainty and confusion about the scope of the Fifth Amendment Takings Clause. The need for guidance from the Court is even more evident upon closer examination of the government's argument. The government, for example, maintains that the "substantially advance" requirement pertains only to regulation of real estate and, in any event, is only a "reasonableness" test. The government, however, does not justify with logic or case law its assertion that this standard is limited to real estate. The Takings Clause of the Fifth Amendment embodies no such distinction.

The government's contention that the "substantially advance" standard is nothing other than a reasonableness test which has remained static since *Nectow v. Cambridge*, 277 U.S. 183 (1928), and *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), is squarely contradicted by *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834 n.3 (1987), and by any considered reading of the Court's takings cases over the last twenty years. Two well-respected experts have recently observed that "[a]lthough the phrase 'substantial relation' appeared in *Euclid*, the meaning of those two words had changed considerably in the interim between *Euclid* and *Nollan*." Charles M. Haar & Michael

A. Wolf, *Commentary:* Euclid *Lives: The Survival of Progressive Jurisprudence*, 115 Harv.L.Rev. 2158, 2186 (2002) (footnote omitted). They also note:

> In the 1920s, decades before the Warren Court adopted the levels-of-scrutiny approach still in use today, a "substantial" relation suggested reasonableness — nothing more and nothing less. Beginning in the 1970s, however, use of the word "substantial" in Supreme Court constitutional scrutiny parlance suggested a step up from the most minimal form of review.

Id. (footnotes omitted). That the government can nevertheless assert in its Brief in Opposition in this case that nothing has changed in the last 75 years is a testament to a need for clarification that only this Court can provide.

Although *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 122 S.Ct. 1465 (2002), became the first opinion of the Court in 15 years to rely on *Allard*, it did nothing to resolve the tension between *Allard* and subsequent opinions of the Court or otherwise elucidate the Court's takings jurisprudence. First, there was no real dispute among the *Tahoe-Sierra* parties that the development restriction at issue "substantially advanced" the protection of Lake Tahoe. *Id.* at 1474 & n.9. Therefore, *Tahoe-Sierra* sheds no light on that standard. Second, *Tahoe-Sierra* distinguished *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), on the ground that *Lucas* involved a permanent ban on development under "a statute 'that wholly eliminated the value' of Lucas' fee simple title" as opposed to the temporary development ban at issue in *Tahoe-Sierra*. 122 S.Ct. at 1483, *quoting Lucas*, 505 U.S. at 1026. Kornwolf's case involves a *permanent* ban on sale, and *Tahoe-Sierra* does not explain how a

permanent ban on sale of an asset such as a feathered Indian artifact can do anything but destroy its economic value. Finally, although *Tahoe-Sierra* cites with approval the *Allard* proposition that the destruction of one strand in a bundle of rights does not constitute a taking, it does nothing to explain or resolve the conflict between *Allard*, on the one hand, and *Hodel v. Irving*, 481 U.S. 704 (1987), and *Babbitt v. Youpee*, 519 U.S. 234 (1997), on the other. The latter two cases the government simply chooses to ignore. In sum, *Tahoe-Sierra* highlights rather than obviates the need for review here.

In opposing the Petition for Writ of Certiorari ("Petition"), the government also relies on an argument that was not a basis for decision in the courts below and was implicitly rejected in *Andrus v. Allard*, 444 U.S. 51 (1979), *i.e.*, that the Fifth Amendment Takings Clause cannot be invoked as a defense in a criminal prosecution.

Timothy Kornwolf has been prosecuted for exercising what this Court has recognized as one of the fundamental rights of property ownership: "that the owner of a property interest may dispose of all or part of that interest as he sees fit." *Phillips v. Washington Legal Foundation*, 524 U.S. 156, 167-68 (1998), *citing United States v. General Motors Corp.*, 323 U.S. 373, 377-78 (1945) (property "denote[s] the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and *dispose of it*.") "The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth a 'personal' right . . . ." *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (1972). This Court has repeatedly found that if the conduct which is the subject of a criminal prosecution falls within the protections of the

Constitution, those Constitutional rights are defenses to the criminal prosecution. Petition at 27 & n.14.[1]

The government contends, however, that Kornwolf cannot raise a taking of his artifacts as a defense, because "even if the statutory ban on the sale of golden eagle feathers effected a taking of petitioner's property, that prohibition would be constitutionally valid and enforceable so long as a just compensation remedy is available." Brief for the United States in Opposition at 4. The government further maintains that "[b]ecause the Tucker Act, 28 U.S.C. 1491, allows petitioner to seek just compensation in the Court of Federal Claims, petitioner is not entitled to raise a takings claim as a defense to a criminal prosecution." *Id.*

In essence, the government argues that the only remedy for a taking by the federal government is a Tucker Act claim, and it cites in support of this proposition civil cases where this Court's concerns were ripeness and the prematurity of the takings claim. These cases do not stand for the proposition that the

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[1]In *Touby v. United States*, 500 U.S. 160 (1991), the Court held that it was appropriate to raise as a criminal defense whether the Drug Enforcement Administration's authority to designate a drug temporarily as a schedule I controlled substance was an unconstitutional delegation of legislative power even though the pertinent statute barred judicial review of temporary designations and provided administrative avenues for challenging the final designation. *Id.* at 168-69. As Justice Marshall observed in his concurrence, "Because of the severe impact of criminal laws on individual liberty, I believe that an opportunity to challenge a delegated lawmaker's compliance with congressional directives is a constitutional necessity when administrative standards are enforced by criminal law." *Id.* at 170. *See Moore v. City of East Cleveland*, 431 U.S. 494, 497 n.5 (1977) ("this Court has never held that a general principle of exhaustion could foreclose a criminal defendant from asserting constitutional invalidity of the statute under which she is being prosecuted").

only remedy for a taking by the federal government is a Tucker Act claim, and they certainly do not support the proposition that an unconstitutional taking cannot be raised as a defense in a criminal prosecution. *See Preseault v. Interstate Commerce Comm'n*, 494 U.S. 1, 17 (1990) (takings claim under National Trails System Act premature because even if the Trails Act did effect a taking, the plaintiffs had not sought just compensation under the Tucker Act); *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 194 (1985) ("taking claim is not yet ripe [because] respondent did not seek compensation through the procedures the State has provided for doing so"); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1019 (1984) ("Because we hold the Tucker Act is available as a remedy for any uncompensated taking Monsanto may suffer as a result of the operation of the challenged provisions . . . we conclude that Monsanto's [Fifth Amendment challenges] are not ripe for our resolution.")

Under the ripeness doctrine, the federal courts cannot render a decision unless there is a "genuine need to resolve a real dispute." Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure*, Juris 2d., §3532.1 (1984). It is the product of both Article III limitations on federal court jurisdiction and prudential concerns. *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 733 n.7 (1997). When courts have dismissed Takings Clause claims as premature, they have held, in essence, that the property owner does not have a case or controversy with the government appropriate for adjudication until and unless the property owner has been denied just compensation.

The concerns underlying the Court's holdings in *Preseault*, *Williamson County*, and *Monsanto* are not

present when a criminal defendant challenges the constitutionality of a statute. Kornwolf obviously has an immediate, concrete controversy with the government: he has been criminally convicted and faces the immediate prospect of criminal sanctions for violating what he maintains to be an unconstitutional statute. Indeed, the very cases upon which the government relies require that there be a "reasonable, certain and adequate provision for obtaining compensation" before the failure to pursue that remedy can render a takings claim premature. *Preseault v. Interstate Commerce Comm'n*, 494 U.S. 1, 11 (1990) (internal citations omitted); *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 194 (1985). Even if it were theoretically possible to seek compensation for the headdress and dance shield in the Court of Federal Claims under the Tucker Act, that court cannot restore Kornwolf's liberty or his good name, which are the principal losses arising from this criminal prosecution and the redress he seeks. *See Lott v. United States*, 11 Cl.Ct. 852 (1987) (Court of Claims does not have power to review and overturn convictions).[2]

Where a compensation remedy is not "reasonable, certain and adequate," other forms of relief are appropriate in the context of a takings claim, including declaratory and equitable relief. *See, e.g., Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 71 n.15 (1978) (Declaratory Judgment Act "allows individuals threatened with a taking to seek a declaration of the constitutionality of the disputed governmental action before potentially uncompensable

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[2] *Cf. Sanders v. United States*, 252 F.3d 1329, 1335-36 (Fed. Cir. 2001) ("[i]t is particularly unreasonable to suppose that Congress in enacting the Tucker Act intended for [the Court of Federal Claims] to intervene in the delicate and sensitive business of conducting criminal trials") (internal citations omitted).

damages are sustained"). As Justice O'Connor observed for the plurality in *Eastern Enterprises v. Apfel*, 524 U.S. 498, 521-22 (1998), not only is relief other than compensation proper, but this Court has granted equitable relief from Taking Clause violations arising from federal legislation without even discussing the applicability of the Tucker Act. This includes the two cases that raised takings issues most analogous to those in this case: *Babbitt v. Youpee*, 519 U.S. 234 (1997) and *Hodel v. Irving*, 481 U.S. 704 (1987). *See also Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 589, 601-2 (1935) (Brandeis, J.) (holding Frazier-Lemke Act void as applied because it violated Fifth Amendment Takings Clause).[3]

This Court in *Andrus v. Allard*, 444 U.S. 51 (1979), obviously asserted jurisdiction in a declaratory judgment action despite the government's argument that the case was not ripe under the Tucker Act. *See* Brief for the Appellants in *Andrus v. Allard*, 13, 33-34. Although the Court rejected the Tucker Act argument *sub silentio*, its observations on standing reflect the significance of criminal sanctions in overcoming the Article III and prudential concerns raised by the government.

> The Secretary has raised the question of appellees' standing to assert a takings claim with respect to their artifacts. . . . All appellees, however, may face future criminal prosecutions for violations of the statutes, and that, of itself, suffices to give them standing to litigate their interest in the construction of the statutes.

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[3] As Justice Stevens observed in his separate opinion in *Palazzolo v. Rhode Island*, 533 U.S. 606, 639 n.1 (2001) (Stevens, J., concurring in part and dissenting in part), "A regulation that goes so 'far' that it violates the Takings Clause may give rise to an award of compensation or it may simply be invalidated as it would be if it violated any other constitutional principle. . ."

Allard, 444 U.S. at 64 n.21. *See also United States v. Kepler*, 531 F.2d 796 (6th Cir. 1976) (considering Takings Clause defense to criminal conviction under the Endangered Species Act). While the Court is not bound by this exercise of jurisdiction in *Allard*, "neither should [it] disregard the implications of an exercise of judicial authority assumed to be proper." *Brown Shoe Co. v. United States*, 370 U.S. 294, 307 (1962).

The government's Tucker Act argument also ignores that a ground for Kornwolf's Fifth Amendment argument is that the Bald and Golden Eagle Protection Act does not "substantially advance" the protection of the golden eagle. In *Yee v. City of Escondido*, 503 U.S. 519 (1992), this Court held that a challenge to a rent control ordinance was ripe even though the petitioner had not sought rent increases. Writing for the majority, Justice O'Connor observed:

> [Petitioners] allege in this Court that the ordinance does not "substantially advance" a "legitimate state interest" no matter how it is applied. See *Nollan v. California Coastal Comm'n*, *supra*, 483 U.S. at 834; *Agins v. Tiburon*, 447 U.S. 255, 260 (1980). As this allegation does not depend on the extent to which petitioners are deprived of the economic use of their particular pieces of property or the extent to which these particular petitioners are compensated, petitioners' facial challenge is ripe.

Yee, 503 U.S. at 533-34. So even if the government's Tucker Act argument were correct, it would not preclude Kornwolf from arguing that his prosecution is unconstitutional because the ban on sale of feathered Indian artifacts does not substantially advance protection of the golden eagle.

CONCLUSION

As stated in the Petition, *Allard* remains an anomalous and puzzling precedent and the doctrinal inconsistency between *Allard* and cases like *Irving*, *Nollan*, *Lucas* and *Youpee*, which has been noted by numerous commentators, remains one of the principal obstacles to a coherent takings jurisprudence. This case presents the Court with a unique opportunity to revisit *Allard* and resolve the confusion that it continues to engender.

Petitioner Timothy Kornwolf respectfully requests that the Court grant his Petition, and thereby not only clarify the scope of the important Fifth Amendment protections at issue, but also restore "fairness and justice" to owners of antique Indian artifacts who play an important role in preserving this country's Native American heritage. *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

Respectfully submitted,

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